



**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

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**DOCKET NO. 12-0203**

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**DAN CAVA, STEVEN HALL,  
SONNY NICHOLSON, AND  
DAN'S CAR WORLD, LLC,  
D/B/A DAN CAVA'S TOYOTA WORLD,**

**Defendants and Third-Party Plaintiffs - Petitioners**

**v.**

**NATIONAL UNION FIRE INSURANCE  
COMPANY OF PITTSBURGH, PA.,**

**Third-Party Defendant and  
Counter-Plaintiff - Respondent**

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**Amended Respondent's Brief**

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## I. STATEMENT OF THE CASE

### A. Summary of Circuit Court's Decision

This Appeal arises from the Circuit Court's January 3, 2012 Order ("Order") granting Respondent National Union Fire Insurance Company of Pittsburgh, Pa.'s ("National Union") Motion for Summary Judgment. The Circuit Court concluded as a matter of law that Petitioners' Third-Party claim against National Union was barred by the applicable one-year statute of limitations, and that the statute of limitations was not tolled by West Virginia Code § 55-2-21. (A.R. 00210 – 00219).<sup>1</sup>

Specifically, the Circuit Court found as a matter of law that the bad faith claims alleged in Petitioners' Third-Party Complaint against National Union did not arise out of the same transaction or occurrence as the underlying claims by Johnnie Fluker, Jr. ("Fluker") against Petitioners, and are not derivative of Fluker's claims against Petitioners. (A.R. 00217). The Circuit Court further found as a matter of law that the facts and law for Fluker's wrongful termination claim against Petitioners were completely distinct from Petitioners' bad faith claims against National Union, and that the two lawsuits did not center upon a common factual or legal situation. (A.R. 00217). The Circuit Court found as a matter of law that there was no mutuality of proof, nor any logical relationship, between Fluker's claims against Petitioners and Petitioners' bad faith claims against National Union. (A.R. 00217). The Circuit Court found that any wrongful termination of Fluker was in no way attributable to the actions or inactions of National Union, and that Fluker would have no direct cause of action against National Union for his alleged wrongful termination. (A.R. 00217 - 00218). Hence, the Circuit Court found that the statute of limitations was not tolled by West Virginia Code § 55-2-21, and Petitioners' claims were barred by the one-year statute of limitations. (A.R. 00218).

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<sup>1</sup> References to the Appendix Record are set forth as "A.R. 00001 - 00306."

**B. Statement of Facts**

Plaintiff Fluker had been an employee of Petitioners for over three years prior to April of 2007. (A.R. 00107 - 00108). On or about July 20, 2007, Plaintiff Fluker brought an Equal Employment Opportunity Commission (“EEOC”) charge of discrimination against Petitioners, alleging that his employment had been wrongfully terminated in connection with an April 2007 altercation, and that he was the victim of racial discrimination and retaliation in connection with the April 2007 altercation. (A.R. 00107 - 00108).

On August 7, 2007, the EEOC sent a Notice of Charge of Discrimination (“the EEOC Notice”) to Petitioners, providing them with notice of the EEOC Charge. (A.R. 00109). On August 31, 2007, Attorney Gregory Schillace (“Attorney Schillace”), acting as counsel for Petitioners, wrote a letter to the EEOC, responding to the July 20, 2007 charge. (A.R. 00110 - 00111).

On or about April 3, 2009, Plaintiff Fluker filed the original Complaint in the underlying lawsuit, alleging that he was subjected to a racially hostile work environment at Petitioners’ facility, that his employment had been wrongfully terminated in connection with the April 2007 altercation referenced above, that he was the victim of racial discrimination and retaliation in connection with the April 2007 altercation referenced above, that the termination of his employment with Petitioners was a breach of an employment agreement, and that Petitioners had violated West Virginia Code § 21-5-4 by failing to pay certain moneys owed to him upon termination of his employment. (A.R. 00001 - 00008).

Petitioners reported the April 3, 2009 Complaint to National Union on or about April 7, 2009 via a report made by the Bond Insurance Agency, Inc., the insurance agent for Petitioners. (A.R. 00121 - 00123).

When providing notice on April 7, 2009, Petitioners failed to advise National Union of the existence of the July 20, 2007 EEOC Charge. National Union did not receive a copy of the EEOC Charge until August 13, 2009. (A.R. 00121 - 00123).

Petitioner Dan's Car World, LLC is the Named Entity under an insurance policy provided by National Union, Policy Number 01-602-66-46 (hereinafter referred to as "The Policy") which has a policy inception date of February 27, 2009 and an expiration date of February 27, 2010. (A.R. 00124 - 00185). The Policy is a "claims made and reported" policy, as opposed to an "occurrence" policy, and states that the **Insureds** shall defend and contest any **Claim** made against them. (A.R. 00124 - 00185).

The Policy provides two forms of insurance coverage: Directors and Officers Coverage and Employment Practices Coverage. (A.R. 00124 - 00185). Only the Employment Practices form of coverage is relevant to this lawsuit. The insuring agreement of the Employment Practices form of coverage under The Policy states as follows (in relevant part):

With respect to the Insuring Agreement and the Defense Provisions of this Clause 1, solely with respect to **Claims** first made during the **Policy Period** or the **Discovery Period** (if applicable), and reported to the **Insurer** pursuant to the terms of this policy, and subject to the other terms, conditions and limitations of this policy, this **EPL Coverage Section** affords the following coverage:

This **EPL Coverage Section** shall pay the **Loss** of an **Insured** arising from a **Claim** first made against such **Insured** for any **Wrongful Act**.

(A.R. 00153). The Policy defines the term **Claim** to include the following:

[A]n administrative or regulatory investigation when conducted by the Equal Employment Opportunity Commission ("EEOC"), or similar state, local or foreign agency, which is commenced by the filing of a notice of charges, service of a complaint or similar document of which notice has been given to the **Insured**.

(A.R. 00153). The Policy defines **Policy Period** as: "[T]he period of time from the inception date stated in Item 2 of the Declarations to the earlier of the expiration date stated in Item 2 of

the Declarations or the effective date of cancellation of this policy.” (A.R. 00132). Therefore, the **Policy Period** of The Policy runs from 12:01 a.m. on February 27, 2009 to 12:01 a.m. on February 27, 2010. (A.R. 00132).

Because Plaintiff Fluker’s EEOC claim was first made in July 2007, prior to the inception date of the policy, National Union denied coverage on the ground that the Claim was not first made and reported during the Policy Period. This denial was expressed in a November 11, 2009 letter to Attorney Schillace. (A.R. 00184 - 00186). A copy of the letter was also mailed to Mark Pallotta at the Bond Agency, the insurance agent for Petitioners. (A.R. 00184 - 00186).

Attorney Schillace received the November 11, 2009 coverage denial letter on November 16, 2009 at 12:52 p.m. via certified mail. (A.R. 00187 - 00189).

### **C. Procedural History**

On December 2, 2010, more than one year after National Union had denied coverage via the November 11, 2009 letter described above, and also more than a year after such was received by Attorney Schillace on November 16, 2009, Petitioners filed their Third-Party Complaint against National Union. (A.R. 00082 - 00092).

In Count I of their complaint, Petitioners alleged violations of the West Virginia Unfair Trade Practices Act (W. Va. Code § 33-11-4(9), *et seq.*, hereinafter referred to as “UTPA”). (A.R. 00082 - 00092). Petitioners further alleged in Count II of their complaint that National Union had breached the common law duty of good faith. The Third-Party Complaint alleged that National Union failed to defend Petitioners in the original action filed by Plaintiff Fluker. (A.R. 00082 - 00092). Petitioners requested in their prayer for relief: compensatory damages, attorneys’ fees, and punitive damages. (A.R. 00082 - 00092). Conspicuously missing from the

Petitioners' Third-Party Complaint was a count for a declaration from the Circuit Court to confirm the existence of insurance coverage for the loss. (A.R. 00082 - 00092).

On January 19, 2011, National Union responded to the Petitioners' Complaint by filing an Answer. In filing its Answer, the absence of a claim by Petitioners for a determination of coverage under The Policy was glaringly obvious, so National Union took it upon itself to file a Counterclaim. (A.R. 00220 - 00239). The Counterclaim requested a declaratory judgment that no liability insurance coverage exists under the National Union insurance policy for Plaintiff Fluker's claims against Petitioners. (A.R. 00220 - 00239). In addition, National Union requested a declaration that it owed no duty to defend Petitioners in regard to the original Complaint in this action. (A.R. 00220 - 00239).

National Union moved for summary judgment on August 30, 2011. (A.R. 00093 - 00106). The Circuit Court granted that motion in an Order dated January 3, 2012, which is described in more detail above. (A.R. 00210 - 00219). Petitioners filed a timely notice of appeal on February 2, 2012.

## II. STANDARD OF REVIEW

In setting forth its proposed Standard of Review for this Court, Petitioners incorrectly state that the Circuit Court entered summary judgment in favor of the appellants, Dan Cava, Steven Hall and Dan's Car World, LLC d/b/a Dan Cava's Toyota World. The Circuit Court did, in fact, enter summary judgment in favor of the Respondent, National Union.

Typically, the Court will apply a plenary review to the entry of summary judgment. Syl. pt. 1, *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994) (holding "entry of summary judgment is reviewed *de novo*.")

### III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Respondent submits that oral argument is desired and should be held pursuant to Rule 19(a) of the W. Va. Rules of Appellate Procedure as the Circuit Court's Order can be upheld with the application of well settled law.

### IV. SUMMARY OF ARGUMENT

The January 3, 2012 Circuit Court Order reached the correct conclusion of law: Petitioners' Third-Party Complaint, which asserts that National Union violated the UTPA and committed common law bad faith, was appropriately time barred by Petitioners' failure to commence their lawsuit within one year after National Union's denial of coverage. Further, West Virginia Code § 55-2-21 did not toll the statute of limitations regarding Petitioners' lawsuit against National Union.

### V. ARGUMENT

#### A. Petitioners' bad faith lawsuit against National Union is time barred.

Petitioners sued National Union for alleged UTPA violations and common law bad faith. Such claims are subject to a one-year statute of limitations.

West Virginia Code § 55-2-12(c) states:

Every personal action for which no limitation is otherwise prescribed shall be brought:

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(c) within one year next after the right to bring the same shall have accrued if it be for any other matter of such nature that, in case a party die, it could not have been brought at common law by or against his personal representative.

This Court has determined that “[c]laims involving unfair settlement practices arising under the [UTPA] [citation omitted] are governed by the one-year statute of limitations set forth in West Virginia Code § 55-2-12(c).” Syl. pt. 1 of *Wilt v. State Auto. Mut. Ins. Co.*, 203 W. Va.

165, 506 S.E.2d 608 (1998). These claims fall within section (c) of West Virginia Code § 55-2-12 because they are tortious in nature and are of “recent statutory genesis [and] . . . clearly did not survive at common law[.]” *Id.* at 171, 614.

The one-year statute of limitations contained in W. Va. Code § 55-2-12(c) also applies to common law “bad faith” claims. Syl. pt. 4 of *Noland v. Va. Ins. Reciprocal*, 224 W. Va. 372, 686 S.E.2d 23 (2009). This Court noted in *Noland* that “when an insurer refuses to defend its insured in an underlying case, any bad faith involved in that refusal to defend terminates when the refusal to defend is conveyed to the insured.” 224 W. Va. at 388, 686 S.E.2d at 39. Thus, this Court held:

In a first-party bad faith claim that is based upon an insurer’s refusal to defend, and is brought under [the UTPA] and/or as a common law bad faith claim, the **statute of limitations begins to run on the claim when the insured knows or reasonably should have known that the insurer refused to defend him or her in an action.**

Syl. pt. 5 of *Noland* (emphasis added).

In *Noland*, this Court held that this standard (i.e., when the insured knows or reasonably should have known that the insurer refused to defend) was satisfied as a matter of law when the insurance company sent a denial letter to the insured. 224 W. Va. at 389, 686 S.E.2d at 40.

In the instant matter, National Union sent a denial letter to Attorney Schillace on November 11, 2009, and he received it on November 16, 2009. (A.R. 00184 - 00186 and 00187 - 00189). Yet, Petitioners’ lawsuit against National Union was not filed until December 2, 2010. This was clearly more than a year after Attorney Schillace had received the denial letter from National Union. Therefore, it is beyond dispute that, but for the application of West Virginia Code § 55-2-21 to toll the applicable one-year statute of limitations, Petitioners’ bad faith lawsuit against National Union is time barred.

**B. West Virginia Code § 55-2-21 does not toll the statute of limitations as to Petitioners' UTPA and bad faith lawsuit against National Union**

**1. The applicable law.**

West Virginia Code §55-2-21 states:

After a civil action is commenced, the running of any statute of limitation shall be tolled for, and only for, the pendency of that civil action as to any claim which has been or may be asserted therein by counterclaim, whether compulsory or permissive, cross-claim or third-party complaint: Provided, that if any such permissive counterclaim would be barred but for the provisions of this section, such permissive counterclaim may be asserted only in the action tolling the statute of limitations under this section. This section shall be deemed to toll the running of any statute of limitation with respect to any claim for which the statute of limitation has not expired on the effective date of this section, but only for so long as the action tolling the statute of limitations is pending.

The only case from this Court that provides guidance regarding the proper interpretation of West Virginia Code §55-2-21 is *J. A. Street & Associates, Inc. v. Thundering Herd Development, LLC*, \_\_\_ W. Va. \_\_\_, 724 S.E.2d 299 (2011). In *J. A. Street*, Thundering Herd Development (“THD”) filed a lawsuit against a geotechnical engineering firm, S & ME, for its alleged negligence in site preparation recommendations for the construction of a Target store and shopping center in Huntington, West Virginia. Over four years later, THD amended its complaint to name J. A. Street and other defendants. J. A. Street filed a cross-claim against S & ME seeking damages for recovery of money expended to remediate settlement damage caused by settlement of fill material used at the construction site by S & ME. J. A. Street also sought contribution and indemnification from S & ME for any judgment THD may obtain against J. A. Street.<sup>2</sup>

Almost two years later, J. A. Street sought leave to amend its cross-claims to include more specific allegations against S & ME in regard to S & ME’s alleged negligence in failing to

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<sup>2</sup> It is worth reiterating that, in the instant matter, Petitioners never sought a determination of coverage under the insurance policy for potential damages they might owe to Fluker in Fluker’s lawsuit against Petitioners. They only sued National Union for bad faith.

identify potential groundwater problems in the fill material used at the construction site. J. A. Street's amended cross-claim also sought recovery of the money it expended to remediate the settlement issues on the construction site. The circuit court granted S & ME's motion to dismiss the amended cross-claims, finding the claims barred by the statute of limitations because J. A. Street had knowledge of an independent action against S & ME in 2003, six years before the amended cross-claim was filed.

On appeal, the issue was whether West Virginia Code § 55-2-21 applied to toll the statute of limitations in regard to J. A. Street's amended cross-claims. In its analysis, this Court found that the statute should be applied as written: During the pendency of a civil action, the statute of limitation shall be tolled as to any cross-claim that has been or may be asserted therein. *Id.*, Syllabus Point 8.

However, this Court's analysis did not end there. The Court went on to examine whether the pleading at issue was properly classified as a cross-claim under Rule 13(g) of the West Virginia Rules of Civil Procedure. The Court examined case law from other jurisdictions that interpreted the definition of cross-claim, as well as case law from other jurisdictions that interpreted the definition of a counterclaim under Rule 13(a), since both subparts of Rule 13 require that such claims arise out of the same transaction or occurrence as the original action. Based on case law from other jurisdictions, this Court issued a new Syllabus Point (Syllabus Point 9) which defines the standard in West Virginia for when a cross-claim arises out of the same transaction or occurrence as the original action. This Court ultimately remanded the case to the Circuit Court for a factual determination as to whether the cross-claim in question satisfied the requirements outlined in Syllabus Point 9. 724 S.E.2d at 309.

**2. Applying *J. A. Street* to a third party claim.**

In order to properly examine whether West Virginia Code § 55-2-21 tolls the statute of limitations regarding Petitioners' lawsuit against National Union, this Court should apply the same logic here that it applied in *J. A. Street*. West Virginia Code § 55-2-21 states that, after a civil action is commenced, the running of any statute of limitation shall be tolled for the pendency of that civil action as to a third party complaint. However, as in *J. A. Street*, the analysis cannot end there. It must be asked: Is Petitioners' lawsuit against National Union properly classified as a third party complaint under Rule 14(a) of the West Virginia Rules of Civil Procedure? This is the precise analysis that was used by the Circuit Court.

Rule 14(a) of the West Virginia Rules of Civil Procedure states, in relevant part:

*When defendant may bring in third party.*—At any time after commencement of the action a defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to the third-party plaintiff for all or part of the plaintiff's claim against the third-party plaintiff.

Looking beyond the text of the applicable Rule of Civil Procedure (as this Court did in *J. A. Street*), West Virginia law is clear that “[a] third-party complaint filed pursuant to Rule 14(a) must be based upon a theory of derivative or secondary liability.” *Christian v. Bank of N.Y. Trust Co., N.A.*, 2010 WL 2465478, slip op. at 2 (S.D.W. Va. 2010) referencing *Laughlin v. Dell Fin. Servs., L.P.*, 465 F.Supp.2d 563, 566 (D.S.C. 2006) (stating that “a third-party defendant’s liability under Rule 14 must be secondary or derivative to the defendant’s liability to the original plaintiff.”). The West Virginia Supreme Court of Appeals has defined “derivative” as “that which has not origin in itself, but owes its existence to something foregoing.” Fn 4 of *Davis v.*

*Foley*, 193 W. Va. 595, 598, 457 S.E.2d 532, 535 (1995) quoting Black's Law Dictionary 443 (6<sup>th</sup> ed. 1990). "It is inherent in the nature of a derivative claim that the scope of the claim is defined by the injury done to the principal." *W. Va. Fire & Cas. Co. v. Stanley*, 216 W. Va. 40, 602 S.E.2d 483 (2004) quoting *Jacoby v. Brinckerhoff*, 735 A.2d 347, 351 (Conn. 1999).

Therefore, following the analysis outlined by this Court in *J. A. Street*, West Virginia Code § 55-2-21 does not toll the otherwise applicable one-year statute of limitations regarding Petitioners' lawsuit against National Union unless Petitioners' lawsuit against National Union is based on a theory of derivative or secondary liability, and the scope of Petitioners' lawsuit against National Union is defined by the injury for which Fluker has sued Petitioners.

**3. Petitioners' lawsuit against National Union is not based on a theory of derivative or secondary liability, nor is its scope defined by the injury for which Fluker has sued Petitioners.**

It is imperative that this Court not misunderstand the nature of Petitioners' lawsuit against National Union. While it may seem unusual (it certainly seemed so to National Union), it is nevertheless true that Petitioners did not sue National Union to obtain insurance coverage for Fluker's lawsuit against them. Petitioners only sued National Union for alleged violations of the UTPA and common law bad faith. The absence of a request for insurance coverage in Petitioners' lawsuit against National Union was so conspicuous that National Union felt it was necessary to file its own counterclaim seeking a declaratory judgment regarding insurance coverage. (A.R. 00220 - 00239).

In order to follow the proper *J. A. Street* analysis, it is appropriate to compare the Fluker lawsuit against Petitioners to Petitioners' lawsuit against National Union. The following is a synopsis of Fluker's lawsuit against Petitioners:

- Fluker seeks to prove that he was wrongfully terminated from his employment with the Petitioners in violation of West Virginia law.

- Fluker claims he was subject to a racially hostile environment.
- Fluker asserts that he was subjected to derogatory comments.
- Fluker asserts that his final paycheck was untimely.
- Fluker asserts that Petitioners' conduct was intentional and malicious and unlawful.

In contrast, the following is a synopsis of Petitioners' lawsuit against National

Union:

- Petitioners seek to prove that National Union violated the UTPA and committed common law bad faith in the handling of the claim presented by the Petitioners.
- Petitioners allege National Union misrepresented pertinent policy provisions.
- Petitioners allege National Union failed to acknowledge and act reasonably promptly on communications.
- Petitioners allege that National Union failed to adopt and implement reasonable standards for the prompt investigation of claims.
- Petitioners assert a failure to timely affirm or deny coverage.
- Petitioners assert a breach of the common law duty of good faith in the handling of this claim.

UTPA and common law bad faith actions are tort actions. *Noland, supra*, 224 W. Va. at 383, 686 S.E.2d at 34. Petitioners have pled tort claims by suing National Union for alleged UTPA violations and common law bad faith. Petitioners **did not** assert any contract claims for insurance coverage under The Policy in their Third-Party Complaint.<sup>3</sup> So, after being sued in a

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<sup>3</sup> Petitioners' Civil Case Information Statement filed with their Third-Party Complaint specifically identified this matter as an "Other Tort" in reference to the "Type of Case." The box for "Contract" actions is not checked. (A.R. 00083).

wrongful termination tort lawsuit, Petitioners sued National Union for the completely different torts of allegedly violating the UTPA and committing common law bad faith.

Is Petitioners' lawsuit against National Union derivative of Fluker's lawsuit against Petitioners? Is the scope of Petitioners' lawsuit against National Union defined by the injury for which Fluker has sued Petitioners? Not under any reasonable analysis. UTPA and bad faith lawsuits are about the conduct of the insurance company during the claim handling process, whereas a wrongful termination lawsuit (with racial discrimination overtones) is about whether the employer improperly terminated an employee's employment. National Union was not in any way involved in the events that led Petitioners to terminate Fluker's employment. Fluker could have never filed a direct action against National Union for the termination of his employment. National Union's claim handling activities have no tortious nexus of any kind to the termination of Fluker's employment.

Petitioners' tort lawsuit against National Union for bad faith clearly does not arise out of the same transaction or occurrence that surrounded the termination by Petitioners of Fluker's employment. The law applicable to Plaintiff Fluker's tort claim for wrongful termination (typically characterized as Labor/Employment law) is completely different from Petitioners' tort claim for a bad faith lawsuit (typically characterized as Insurance/Bad-Faith law).

There is no mutuality of proof or evidence to be presented in these actions between Plaintiff Fluker's claims and Petitioners' Third-Party claims. At a (hopefully fictional) unified trial of these two disparate lawsuits, not only would Fluker be attempting to prove completely different facts from those at issue in Petitioners' bad faith case against National Union, but

Petitioners' attempts to make any sort of case against National Union would severely hurt their chances of successfully defending against Fluker's lawsuit. Petitioners cannot prove any aspect of their bad faith case without informing the jury of the possible presence of liability insurance, which would run the risk of substantially prejudicing the jury. There is no logical overlap of relevant evidence between these two lawsuits and as such, there was absolutely no reason why Petitioners had to await a ruling upon their motion for leave to file the lawsuit as a third party complaint; they had the right to file it as what it really was: an independent lawsuit.

Simply put, these two lawsuits would never be tried at the same time. They really are two separate tort lawsuits for two separate torts committed at separate times, with separate and dissimilar relevant evidence being used to prove two very different things.

Petitioners' lawsuit against National Union is not derivative of Fluker's lawsuit against Petitioners. Thus, Petitioners' lawsuit against National Union is not properly classified as a third party complaint under Rule 14(a) of the West Virginia Rules of Civil Procedure, West Virginia Code § 55-2-21 does not toll the otherwise applicable one-year statute of limitations regarding Petitioners' lawsuit against National Union. Petitioners' failure to timely file their lawsuit should carry the consequences intended by the statute of limitations, and West Virginia Code § 55-2-21 should not create a safe harbor for a lawsuit that is clearly time barred.

**4. Petitioners' misapplication of *J. A. Street*.**

Petitioners would have this Court summarily discount its holdings in *J. A. Street* on the basis that *J. A. Street* dealt with a "cross-claim" not a "third-party" complaint. However, this is short-sighted. The statute that was interpreted in *J. A. Street* was West Virginia Code § 55-2-21. That statute deals with cross-claims, counterclaims and third party complaints. Unlike a valid

counterclaim or cross-claim, and, unlike many third party complaints, Petitioners' lawsuit against National Union clearly could have been (and should have been) filed as a separate lawsuit. *J. A. Street* contains a thoughtful analysis of how to apply the statute. No court trying to determine whether West Virginia Code § 55-2-21 applies to toll a statute of limitations regarding a cross-claim, counterclaim or third party complaint can ignore the analysis contained in *J. A. Street*.

Petitioners also argue that, because their lawsuit against National Union was allowed to be filed as a third party complaint, Syllabus Point 8 of *J. A. Street* dictates that the statute of limitations is tolled, end of story. According to Petitioners, West Virginia Code § 55-2-21 tolls the statute of limitations as to third party complaints, their lawsuit against National Union was filed as a third party complaint, so the statute of limitations is tolled. Of course, *J. A. Street* did not stop with such a simplified analysis. It would have been a very different opinion if it had. In *J. A. Street*, this Court went beyond the simple application of the tolling portion of West Virginia Code § 55-2-21 and looked at whether the pleading in question was properly classified as a cross-claim under Rule 13(g) of the West Virginia Rules of Civil Procedure. The Court also went beyond the wording of Rule 13(g) and looked to case law to help it craft a test for whether a pleading is properly classified as a cross-claim for the purpose of applying West Virginia Code § 55-2-21. The Court issued a new Syllabus Point (Syllabus Point 9) which defines that standard, and remanded the case to the Circuit Court for a factual determination as to whether the cross-claim in question satisfied the requirements outlined in Syllabus Point 9. 724 S.E.2d at 309. It would be a mistake for this Court to ignore the analysis it gave this issue less than a year ago.

**5. Petitioners' "estoppel" argument regarding the timing of National Union's Motion for Summary Judgment is without merit.**

Petitioners argue that their Third-Party Complaint was filed with leave of the Circuit

Court and claim that National Union “did not object to or move to dismiss the third-party complaint.”<sup>4</sup> National Union did, in fact, object to the Third-Party Complaint and reserved its right to move to dismiss the Third-Party Complaint should discovery and investigation reveal that the Third-Party Complaint failed to state a claim upon which relief could be granted. Furthermore, National Union reserved the right to assert the defense that the Third-Party Complaint was barred by the statute of limitations. (A.R. 00220 - 00239). National Union’s decision to file a declaratory judgment counterclaim did not concede the appropriateness of the Petitioners’ Third-Party Complaint under Rule 14(a). National Union properly preserved its right to raise this issue, and then dealt with it at the appropriate time. After a contentious discovery period and additional investigation, National Union specifically addressed the statute of limitations affirmative defense by filing its Motion for Summary Judgment. Such cannot be seen as a valid basis for the application of estoppel.

## VI. CONCLUSION

Petitioners’ lawsuit against National Union is clearly barred by the applicable one-year statute of limitations. Only West Virginia Code § 55-2-21 can save Petitioners’ lawsuit from that fate. However, West Virginia Code § 55-2-21 should not toll the statute of limitations. In order for such tolling to occur, *J. A. Street* requires that Petitioners’ lawsuit against National Union be a derivative action of Fluker’s lawsuit against Petitioners. Petitioners’ lawsuit against National Union is clearly not derivative of Fluker’s lawsuit against Petitioners. Therefore, it is not properly classified as a third party complaint, West Virginia Code § 55-2-21 does not apply, the statute of limitations is not tolled, and Petitioners’ lawsuit against National Union is time barred.

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<sup>4</sup> See Amended Brief of Appellants, Dan Cava, Steven Hall and Dan’s Car World, LLC D/B/A Dan Cava’s Toyota World at page 9.

**WHEREFORE**, it is respectfully requested that this Court affirm the January 3, 2012 Order of the Circuit Court of Marion County which granted summary judgment to National Union on this issue.

Respectfully submitted,

**NATIONAL UNION FIRE INSURANCE COMPANY  
OF PITTSBURGH, PA**



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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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DOCKET NO. 12-0203

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DAN CAVA, STEVEN HALL,  
SONNY NICHOLSON, AND  
DAN'S CAR WORLD, LLC,  
D/B/A DAN CAVA'S TOYOTA WORLD,

**Defendants and Third-Party Plaintiffs - Petitioners**

v.

NATIONAL UNION FIRE INSURANCE  
COMPANY OF PITTSBURGH, PA.,

**Third-Party Defendant and  
Counter-Plaintiff - Respondent**

**CERTIFICATE OF SERVICE**

I, Don C. A. Parker, hereby certify that service of the foregoing **Amended Respondent's Brief** has been made upon counsel of record by placing a true copy thereof in the regular course of the United States Mail, with postage prepaid, on this 31<sup>st</sup> day of August, 2012, addressed as follows:

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A handwritten signature in black ink, appearing to read "Don C.A. Parker", written in a cursive style.

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Don C.A. Parker (WV State Bar # 7766)